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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-945

STEPHAN RIESS and THELMA MCKINNEY RIESS,
Petitioners,

vs.

JOHN D. MURCHISON and C. W. MURCHISON, JR., Executors of the Will of C. W. Murchison, Deceased, and THE SIMI VALLEY DEVELOPMENT COMPANY, a corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Stephan Riess and Thelma McKinney Riess, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this cause on September 12, 1974.

Opinions Below.

The Opinion of the Court of Appeals is reported at 503 F.2d 999 and appears in Appendix "A", *infra*. The unreported opinion of District Judge Harry Westover of the District Court for the Central District of California appears in Appendix "B", *infra*.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 12, 1974 (See Appendix A). A timely petition for rehearing was denied on December 5, 1974 (See Appendix C). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

I. Whether the Court of Appeals may make findings on contested facts never submitted to the District Court for decision, thereby short-circuiting the function of the District Court to make findings of ultimate fact?

II. Where the Court of Appeals has made findings of fact in the first instance on a disputed and insufficient evidentiary record, does the District Court's function to make findings on contested questions of ultimate fact—pursuant to (i) the Seventh Amendment right to trial by jury, (ii) 28 U.S.C. §2106, and (iii) Rule 52(a), Federal Rules of Civil Procedure—require a remand to the District Court for findings on the ultimate fact?

Constitutional Provisions, Statutes, and Rule Involved.

Constitution of the United States.

Article III, Section 2, Clause 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statutes of the United States.

28 U.S.C., Section 2106. Determination:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or r. erse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. Section 2072. Rules of Civil Procedure for District Courts:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial

by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Rule.

Federal Rules of Civil Procedure, Rule 52(a):

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56, or any other motion except as provided in Rule 41(d).

Statement.

This is a civil action for money damages arising from the breach of a contract by C. W. Murchison and The Simi Valley Development Company with petitioners. The contract concerns the sale by petitioners to the Murchison interests of [illegible] in residential subdivision and water-bearing lands in the Simi Valley, adjacent to metropolitan Los Angeles. The written agreement, which has been thoroughly construed in the District Court and in three appeals to the Ninth Circuit,[1] provided for compensation to petitioners, the sellers of the land, based upon a formula tied to the water production capacity of the water lands.

The maximum price payable to petitioners under the formula was $1,000,000.00, provided that the water lands had the capacity to serve a contemplated subdivision development on adjacent property, concurrently sold to the Murchisons by petitioners, and on other Murchison land. After using the petitioners' wells, the Murchisons stopped paying petitioners, asserting that the water lands did not have the requisite productive capacity to serve approximately 300 subdivided residential lots and additional land held for subdivision by the Murchisons.

The Murchisons had the option under the contract to reconvey the three and one-half acres of water lands to petitioners if the Murchisons were of the opinion that the water lands were incapable of producing water in quantities sufficient to be commercially profitable to them. After paying petitioners installments aggregating

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[1]See *Riess v. Murchison*, 329 F.2d 635 (9th Cir., 1964); *Riess v. Murchison*, 384 F.2d 727 (9th Cir., 1969); and *Riess v. Murchison*, 503 F.2d 999 (9th Cir., 1974).

$108,000.00 and one-sixth of the stock of respondent Simi Valley Development Company, the Murchisons refused to make further payments. However, respondents never exercised their option to reconvey the water lands to petitioners for insufficiency of water—an act which would have terminated respondents' obligation to pay further money under the contract. 329 F.2d 635, 637-638.

Petitioners filed this action in the District Court for failure of the buyers to pay the balance of the agreed consideration.

Between the second and third appeals to the Ninth Circuit, and as a result of the Ninth Circuit's decision in the second appeal, a portion of the dispute in litigation was referred to three arbitrators to determine whether the water lands had sufficient productive capacity to require respondents to build a reservoir and pipelines from the water lands. The arbitrators concluded in a unanimous award that the water lands did not have sufficient potential to require such construction by respondents.

However, the arbitrators were not required by the contract or by the order of reference from the District Court to make any finding in their award on the actual capacity of the water lands. All that was required was a *yea* or *nay* on the question whether the water lands had the capacity permanently to supply the adjacent land with its water needs [CT 415, 417-418] (App. A-9 to A-10).

The trial in the District Court resumed after the arbitrators' decision, and resulted in a judgment, supported by findings of fact and conclusions of law, in

favor of petitioners, for the unpaid balance due on the $1,000,000.00 price ($892,000.00), plus interest thereon until paid (App. B-13). Respondents never requested findings from the District Court on the water production capacity of the water lands and the District Court made none. That question had not been tried in the District Court. Before the trial, each of the three arbitrators had expressed his individual opinion on the permanent water potential of the Riess wells, and each arbitrator had announced a different number (App. A-10 to A-11)—ranging from 50-150 gallons per minute ["gpm"] (the opinion of the arbitrator selected by respondents) to not less than 500 gpm (the opinion of the arbitrator designated by petitioners). The neutral arbitrator, selected by both sides, estimated an intermediate capacity of 300 gpm [CT 420].[2]

In affirming the adjudication of breach of contract, the Ninth Circuit reversed the damage findings and conclusions of the trial judge. However, instead of remanding the case for findings on the productive capacity of the water lands—the basis on which the Court of Ap-

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[2]The arbitrators' estimates of water production potential were all subject to increase from the stated flow rates, because the arbitrators were unanimous in the opinion that, in addition to their individual projections of permanent capacity of the Riess wells, additional water—in an unknown quantity—could be produced from underground reservoirs for up to five years after pumping began [CT 420]. However, without any supporting evidence or arbitrator's opinion on the question, the Court of Appeals selected 150 gpm for 5 years as the amount of water recoverable from accumulation in the underground reservoirs (App. (App. A-32; 503 F.2d 999, 1013-1014).

The neutral arbitrator's estimate of 300 gpm was qualified by a seemingly inconsistent parenthetical reference to respondents' arbitrator's substantially lower estimate "as a safe business computation" (App. A-11). See the discussion of this uncertainty and its legal implications in footnote 16, *infra*, and accompanying text.

peals determined to fix petitioners' damages—the Ninth Circuit chose to short-circuit the fact-finding process and make its own finding on water potential (App. A-29 to A-33; 503 F.2d 999, 1012-1014). That appellate fact determination was made by selecting the opinion expressed by the one arbitrator most favorable to the buyers, *i.e.*, the arbitrator nominated by respondents, and by rejecting without explanation the opinions on greater water potential announced both by the petitioners' designated arbitrator and the neutral arbitrator.[3]

The resulting judgment of the Court of Appeals reduced petitioners' recovery from approximately $1,900,000, including interest to January 1, 1975, to approximately $320,000, including interest. Had the neutral arbitrator's opinion been followed by the appellate court, petitioners' recovery with interest would have been approximately $547,000. Adoption of the opinion on water capacity expressed by petitioners' designee on the arbitration panel would have produced a recovery for petitioners of approximately $952,000, including interest.[4]

The District Court has never been called upon to make a finding of fact on the water potential of the subject lands, either through respondents' request for

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[3]The Ninth Circuit's computation assumed a constant water capacity of 150 gpm for 20 years, 24 hours per day—a period arbitrarily selected by the Court of Appeals with no relevant basis therefor in the record—and an additional potential of 150 gpm for the first 5 years of the 20-year period (see fn. 2, *supra*) (App. A-32; 503 F.2d 999, 1013-1014).

[4]Schedules detailing the computations of damages using each of the three different arbitrators' opinions on water potential of the Riess wells appear in the petition for rehearing filed in the Court of Appeals (Pet. for Reh., Appendices A, B, and C).

findings or by order of the Court of Appeals. The three-man panel of arbitrators was never asked to make a finding on that question and, as a panel, the arbitrators never made such a finding. At no time prior to announcement of the Ninth Circuit's decision did either side request findings of fact from the arbitrators, from the District Court, or from the Court of Appeals on the number of gallons per minute producible from the water lands.

When the Ninth Circuit announced its decision, petitioners moved for rehearing in the Court of Appeals, requesting the court to modify its decision by remanding the case for findings on the water capacity of the land, or, in the alternative, to adopt the opinion of the neutral arbitrator on that fact. Rehearing was denied without modification of the decision (Appendix C, *infra*).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals suggests in the opening paragraph of its opinion why it short-circuited the fact-finding function of the District Court in this case:

> ". . . It is time to terminate this litigation. To the full extent of our ability and power, the disposition embodied in this opinion is directed to that end." (App. A-1; 503 F.2d 999, 1000).

To accomplish that objective, the Ninth Circuit elected to make its own findings of fact on the water production capacity of the Riess wells. Although the court's goal of judicial economy was worthy, the means employed usurped the function of the trial court which was best suited to make findings of ultimate fact on an evidentiary record which was (i) incomplete on the pertinent matters, (ii) in dispute, and (iii) therefore an inappropriate record on which to ground a final decision on the amount of damages to be awarded to petitioners. On such an inadequate appellate record, the Ninth Circuit reduced petitioners' damages from $1,900,000 to $320,000 without substantiating the well capacity used to arrive at that final decision.

Having concluded that the trial judge improperly calculated damages when he adopted the theory that the nature of respondents' breach required payment of the maximum contract price of $1,000,000 (less payments heretofore received), the Court of Appeals should have remanded the case to the District Court so that findings could be made for the first time on the actual capacity of the wells. From that finding, the correct award to petitioners would have been a matter of simple arithmetic computation under the contract price for water.

Instead, the Ninth Circuit made its own finding of fact on the capacity of the Riess wells, choosing for its basis of decision the *lowest* of three different opinions of non-judicial arbitrators on the water capacity. The trial judge had never been requested to make findings on that question, and he had made none. The focus of the litigation before decision of the third appeal had been on procedural matters and on the question of total breach *vel non*. Respondents were not contesting the amount of the trial court's judgment. Rather they urged that total breach had not occurred and that petitioners were not entitled to any damages whatsoever. The defense pursued an all or nothing strategy.

Thus, when the Court of Appeals affirmed the trial court's finding of total breach and addressed itself to the amount of damages awarded, the reviewing court was striking out into uncharted waters. When the court chose that high risk course in order quickly to terminate this protracted litigation, it forsook the protections implicit in the review of a neutral fact determination made on an evidentiary record by a trier of fact in an adversary setting. One of those protections is the opportunity of the contesting parties to brief and argue their informed views on the matter in dispute. Another of those protections is the opportunity of the trial judge to weigh the credibility of percipient and expert witnesses. None of these procedural safeguards preceded the Ninth Circuit's fundamental redetermination of damages recoverable by petitioners.

Without evidence in the appellate record on which to determine the well capacity, the Court of Appeals was forced to select among three conflicting opinions on capacity expressed by three arbitrators, incident to

their collective ruling on the ability of the wells to supply the adjacent subdivision lands. There was no obligation upon the arbitrators to agree on the pumping potential of the Riess wells. Their sole task was to reach at least majority agreement on the arbitration issue: sufficiency of water capacity to oblige respondents to construct a reservoir and pipelines. No collective finding upon discrete capacity of the wells was required of the arbitrators and none was made.

The finding of 150 gpm capacity for 20 years by the Court of Appeals was the first and only judicial finding on that ultimate and decisive question of fact. Both sides of the case were thereby deprived of the right to the trial of ultimate questions of fact by a trial judge (jury trial having been waived).

The scope of appellate review of findings of fact is a problem that first arose in the federal judicial system with the adoption of the Constitution.[5] Because all actions at law were to be tried by jury, strong demands were voiced for the protection of this method of trial.[6] These demands led to the adoption of the Seventh Amendment, which sharply limited the scope of appellate review of facts by requiring adherence to the common-law rules.[7] This provision was early con-

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[5]See Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi.L.Rev. 190, 192 (1937).

[6]This demand was stimulated by a provision in the Constitution that the "supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., Art. III, §2.

[7]U.S. Const., Amend. VII.

strued to mean that if there was any substantial evidence which supported the verdict the verdict must stand.[3]

The problem of the scope of factual review in actions at law arose again in 1865 when Congress passed an act allowing waiver of trial by jury.[9] For the first time, the question was presented on the weight to be accorded findings of fact by a judge sitting without a jury. The statute provided that the findings of the trial court would be given the same effect as a jury verdict. In 1934, Congress empowered this Court to prescribe rules of procedure for the district courts and to adopt a uniform procedure applicable both to legal and equitable actions.[10] Under that grant of power, this Court promulgated the Federal Rules of Civil Procedure. The provisions of the 1865 Act were superseded by Rule 52(a), F.R.Civ.P., which defines the scope of appellate review of factual findings in a non-jury proceeding. This rule provides, in pertinent part, that "Findings of Fact shall not be set aside unless *clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Italics added).[11]

Not only must an appellate court sustain the decision of a trial court unless the trial court's finding

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[8]*Aetna Life Insurance Co. v. Ward,* 140 U.S. 76, 91, 11 S. Ct. 720, 725 (1891); *Lancaster v. Collins,* 115 U.S. 222, 6 S.Ct. 33 (1885).

[9]Act of March 3, 1865, c. 86, §4, 13 Stat. 501.

[10]28 U.S.C. 2072 (1949).

[11]See 2 Stan.L.Rev. 784 (1950).

was "clearly erroneous", but also the appellate court may not make its own findings without sufficient evidence in the record as noted in *Carr v. Corning*, 182 F.2d 14, 22 (D.C. Cir., 1950):

> "We cannot draw conclusions by speculation where the data necessary for certainty was not given in the trial court."[12]

The question whether an appellate court can make findings of fact has often arisen when the trial court's decision was not based on witness credibility but grounded solely on documentary or other undisputed evidence. One school of thought suggests that where the credibility of witnesses is not an issue, appellate courts do not have to apply the clearly erroneous rule. This view was expressed by Circuit Judge Frank in *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir., 1950):

> "[I]f [the trial judge] decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding."

Professor Moore supports this view. 5 Moore's Federal Practice 2637, fn. 2. However, other courts have held that the "clearly erroneous" test does give some discretion to the district judge, even where the factual issue turned on written instruments and depositions. This seemed to be the view of Circuit Judge Clark, who drafted Rule 52(a).[13]

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[12]See also, *Riley v. Titus*, 190 F.2d 653, 655 (D.C. Cir., 1951).

[13]See 5 Moore, Federal Practice 2642, fn. 22; *Widney v. U.S.*, 178 F.2d 880 (10th Cir., 1949); *Friedman v. Sealy, Inc.*, 274 F.2d 255 (10th Cir., 1959); *Snorgrass v. Sears, Roebuck & Co.*, 275 F.2d 691 (7th Cir., 1960); and *Commissioner of*

In the *Lundgren* case (see fn. 13, *supra*), the Ninth Circuit noted that nothing in the history of review of equity or law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Nor should Rule 52(a) be construed to encourage appeals based on the hope that the appellate court will second-guess the trial court.

The apparent conflict in the circuits concerning the right of an appellate court to make findings of fact[14] has never been resolved by this Court. According to the author of an A.L.R. note (see fn. 14, *supra*), although the Supreme Court has never been presented with a factual situation in which it might have been able to lay to rest all differences concerning findings of fact based on documentary evidence, it is a general belief (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525 (1948), *rehearing denied*, 338 U.S. 869, 68 S.Ct. 788), that this Court has indicated that the "clearly erroneous" test is to be applied to all findings of fact, whatever the nature of the evidence in the trial court.

Here, we are not dealing with the question whether an appellate court can review documentary evidence and reach a different factual conclusion than the trial court. The Court of Appeals has based its finding of

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Internal Revenue v. Duberstein, 363 U.S. 278, 289-291, 80 S. Ct. 1190 (1960), as well as numerous cases on both sides of the issue in the Ninth Circuit cited in *Lundgren v. Freeman*, 307 F.2d 104, 114-115 (9th Cir., 1962).

[14]See, *e.g.*, the discussion on the application of the "clearly erroneous" test of Rule 52(a), Federal Rules of Civil Procedure, to the trial court's findings of fact based on documentary evidence in 11 A.L.R. Fed. 212 (1972).

fact on the unsworn opinion of one of three arbitrators, none of whom was subject to cross-examination. Such extra-judicial opinion was not evidence on the damage issue. The question presented is whether the reviewing court may make the initial finding on a question of ultimate fact never presented to the trial court for decision, a question that can only be resolved by weighing conflicting percipient and expert opinion testimony.

In this action, the trial court did not concern itself with the amount of water producible from the Riess wells. The District Court was of the opinion that the contract provided for the payment of $1,000,000. Moreover, the District Court found that the conduct of the buyers had made it impossible to determine actual or potential water production from the Riess wells, because the buyers had closed down the wells, and they had failed to keep or deliver records of water actually produced, saved, and sold when the wells were in production. The buyers' conduct made it impossible for petitioners, the court, or anybody else accurately to determine the amount of water which the water lands in fact produced, or which the water lands could have produced during the period when the buyers had possession of the realty.[15]

Thus, in order for the Ninth Circuit to redetermine damages based on well capacity, it not only had to find that the trial court's opinion was "clearly erroneous" as to the impossibility of determining water production, but also the Court of Appeals had to make factual assumptions about water production without definitive evidence in the judicial record on the issue. In

[15]Finding of Fact 32 [CT 944]; Memorandum Decision (App. B-11 to B-13); Ninth Circuit's Opinion (App. A-11 to A-15, A-31; 503 F.2d 999, 1013).

resorting to the arbitrators' report as a guide to the amount of water potential of the Riess wells,[16] the Ninth Circuit disregarded two of the three arbitrators' opinions and accepted the third arbitrator's estimate—the lowest opinion of the three-man panel. That selection was arbitrary and capricious. No rationale for the choice among the three arbitrators appears in the opinion below. By this unexplained exercise of discretion, the reviewing court not only ignored the "clearly erroneous" test, but also it assumed the constitutional, statutory, and rule defined function of a district court.

Title 28, United States Code §2106 sets the limits on action by a federal appellate court. The statute provides that any court of appellate jurisdiction may:

> "affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

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[16]The Ninth Circuit recognized that some danger attended its computation of damages:

> "While it is a close question whether the findings of the arbitrators alone furnish sufficient data upon which to so measure damages, we believe the interests of justice will be best served by treating this data as sufficient." (App. A-31 to A-32; 503 F.2d 999, 1013).

However, the authorities cited in support of this unprecedented exercise stand for the opposite of what the Court of Appeals did. See, *e.g.*, *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal.2d 634, 160 P.2d 804, 813 (1945); *Bertero v. National General Corp.*, 254 Cal.App.2d 126, 62 Cal.Rptr. 714, 729 (C.A. 1967); *Pacific Scientific Co. v. Glassey*, 245 Cal.App.2d 831, 54 Cal.Rptr. 235, 243 (C.A. 1966). These cases hold that petitioners should have received the benefit of any doubt on the extent of petitioners' damages where the respondents' breach of

(This footnote is continued on next page)

Congress has not authorized a reviewing court to make findings in the first instance on a contested issue of ultimate fact.

The boundaries of appellate discretion were noted in *Traylor v. United States*, 396 F.2d 837 (6th Cir., 1968). In *Traylor*, the plaintiff had brought an action under the Federal Torts Claims Act for damages for personal injuries. The defendant admitted liability and the question of damages was submitted on a deposition transcript to the district judge, sitting without a jury. No live testimony was heard. The plaintiff appealed from the $5,000 judgment of the District Court, claiming that the award was inadequate and that the District Court erred in failing to make a finding of permanent injury. After noting that the appellate court's jurisdiction was limited to an assessment whether the finding of damages was "clearly erroneous", the Sixth Circuit observed that had it been the trier of fact in the first instance, it would have granted a larger award to the plaintiff. However, the Court of Appeals went on to observe that its view of the facts is not the relevant test on appeal from a finding by a district judge. Although the plaintiff requested the appellate court to make its own findings on damages, the Sixth Circuit held that fact finding on damages was not its province (396 F.2d at 840):

> "Although the Plaintiff-Appellant insists that a remand is unnecessary, we do not consider this an appropriate case for an Appellate Court to make independent findings of damages. In some excep-

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duty and failure of proof on damages (failure to keep records on water flow) created the uncertainty. Applying this rule of contract damages upside down, the Court of Appeals directed respondents to pay *less* damages because of their failure to account to petitioners.

tional cases, inadequate damages awarded by a court sitting without a jury have been increased by the Courts of Appeals, obviating the necessity for a remand, *United States v. Compania Cubana de Aviacion, S.A.*, 224 F.2d 811 (5 Cir. 1955); *Dale Benz, Inc., Contractors v. American Casualty Co.*, 303 F.2d 80 (9th Cir. 1962); *Simpson v. United States*, 322 F.2d 688 (5th Cir., 1963); and even the more elusive assessment of pain and suffering has been increased where the '* * * unchallenged findings of the district court [were] sufficient * * *' *Thomas v. United States*, 327 F.2d 379, 381 (7th Cir., 1964). Those cases, however, were either actions for contract damages, which are capable of more precise evaluation from a bare record, *Dale Benz, Inc., Contractors v. American Casualty Co.*, 303 F.2d 80 (9th Cir. 1962), *supra*, or cases, such as the *Thomas* case where the district court's opinion provided '* * * firm guidelines establishing the basic elements of the award * * *' *Simpson v. United States*, 322 F.2d 688, 693 (5th Cir. 1963). Here we do not have the benefit of the District Court's findings of fact or conclusions of law concerning the basic elements of damages or the amounts awarded for each element.[17]

"In this posture, even when the case was heard on deposition, we consider that our only alternatives are to remand or to determine the minimum

[17]In *Dale Benz, Inc., Contractors, supra* (303 F.2d at 82), the Ninth Circuit avoided remand for further findings by the district judge, because the "issues arise out of and are concerned with figures and arithmetical calculations." In this case, the ultimate fact found by the Court of Appeals was the foundation for arithmetical calculations required by its interpretation of the contract, not the arithmetic.

> amount of damages that the District Court could have awarded without constituting reversible error. *Mitchell v. Evelyn C. Brown, Inc.*, 310 F. 2d 420 (1st Cir., 1962). Ordinarily when a District Court fails to make necessary findings, an Appellate Court will vacate the judgment and remand the case for appropriate findings. *Hatahley v. United States*, 351 U.S. 173, 76 S. Ct. 745, 100 L.Ed. 1065 (1956); see also 5 Moore, Federal Practice, Par. 52.06[2]. We consider that course more appropriate in this case."

The Sixth Circuit's remand in the *Traylor* case for damage findings was the procedure which the Ninth Circuit should have adopted here. Because the trial judge below did not make any findings regarding water production potential,[18] the Court of Appeals had no basis for its finding on water production capacity. In fact, in making such a finding, the Ninth Circuit violated its own rules of decision. See: *Jones & Guerrero Company v. Smith*, 292 F.2d 815, 818 (9th Cir., 1961), in which it noted:

> "At the threshold of our consideration of this problem we are confronted by the fact that the findings of fact of the District Court contain no finding whatsoever relating to the doctrine of estoppel. It is not the function of this Court to make findings of fact which trial courts should have made. *Yanish v. Barber*, 9 Cir., 1956, 232 F.2d 939."

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[18]In fact, the trial judge expressly found that the actions of the defendants in not keeping records made it impossible to determine actual or potential water production (Finding 32 [CT 944]).

Although the *Jones* decision goes on to note that a remand is not necessary in every case in order to correct the failure of the district court to make a finding, a remand is necessary where there is not sufficient evidence on which to base a new finding of fact.

On several occasions this Court has remanded actions to district courts to make further findings of fact, noting the Court's inability to appraise factual material. See, *e.g., Calhoun v. Latimer,* 377 U.S. 263, 84 S.Ct. 1235 (1964), where the judgment in a school desegregation case was vacated and the cause was remanded to the district court so that the nature and effect of a school board's resolution, authorizing free transfers with certain limitations in the City's high schools, could be appraised by the district court in a proper evidentiary hearing.

Similarly, in *Waialua Agricultural Co. v. Meneja,* 316 F.2d 466, 474 (9th Cir., 1954), *rvsd. on other grnds.,* 349 U.S. 254, 75 S.Ct. 719 (1955), the Ninth Circuit noted that:

> "We are forbidden by statute, custom and rule from making new findings of fact, even where we believe these are demanded by the record. This prohibition does not vanish where, as here, comprehensive agreements of facts are made in writing and much of the proof is documentary while the testimony does not bear on the contested issues. Writings and agreements of the parties are notoriously meretricious in dealings with jurisdictional or constitutional questions. Where some findings are clearly erroneous, our duty is to reverse."

The Fifth Circuit has acknowledged that it is bound by the same prohibition. In *Johnson v. United States,*

256 F.2d 849 (5th Cir., 1958), the court noted that it was the duty of the trial court adequately to deal with and to distinguish with clarity what it finds as fact and what it concludes to be a matter of law. It is not the duty or the right of the appellate court to make an independent determination on questions of fact. Where the district judge has failed to make findings upon certain issues, the Fifth Circuit said that it would be unable either to affirm or reduce the judgment, because such action would constitute an initial determination of the facts by the reviewing court. A new trial was ordered by the Fifth Circuit.

Here, a new trial is not required. All that needs to be done is a limited remand to the District Court for a hearing and determination on the amounts of water which might have been produced from the Riess wells if the buyers had not breached the contract. On such a remand, the district judge, who is intimately familiar with this protracted litigation, may determine to place weight on the *average* of the disparate estimates of the three arbitrators or to supplement the record with additional evidence on the question.

It is unlikely, however, that on remand the district judge would resolve the damage issue by choosing the *lowest* of the three estimates from the arbitrators—especially when the estimate emanated from the arbitrator nominated by respondents. Petitioners were entitled to a finding on damages by the trial court, subject to review under the standards of Rule 52(a), F.R.Civ.P. The result of the Ninth Circuit's last opinion is that after 16 years of litigation, petitioners have not had their day in court on the amount of damages to which they are entitled.

Conclusion.

For the reasons stated, a writ of certiorari should issue to resolve the question whether the Court of Appeals may determine in the first instance questions of ultimate fact on damages which have never been litigated in the district court.

Respectfully submitted,

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APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Stephan Riess and Thelma McKinney Riess, Appellees, vs. John D. Murchison and C. W. Murchison, Jr., Executors of the Will of C. W. Murchison, Deceased, Appellants, vs. Simi Valley Development Company, a corporation, Third Party Defendant-Appellant. No. 72-2528.

[September 12, 1974]

Appeal From the United States District Court
Central District of California

Before: CHAMBERS and SNEED, Circuit Judges, KING,* District Judge.

SNEED, Circuit Judge:

This case is no stranger to this Court. It has been here twice before. *Riess v. Murchison,* 329 F.2d 635 (9th Cir., 1964); *Riess v. Murchison,* 384 F.2d 727 (9th Cir., 1969). The initial complaint was filed approximately sixteen years ago, *viz.* on October 8, 1959. It is time to terminate this litigation. To the full extent of our ability and power, the disposition embodied in this opinion is directed to that end.

I.

The History of This Litigation.

The issues before us in this third appeal can best be understood by tracing the history which has given rise to them.

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*Honorable Samuel P. King, United States District Judge, District of Hawaii, sitting by designation.

A. The First Appeal: *Riess v. Murchison,* 329 F.2d 635 (9th Cir., 1964)

In our opinion dealing with the present controversy, this Court, speaking through Judge MacBride, outlined the underlying facts, and the legal theories of the parties, in the following manner:

This is a diversity action involving a land sale contract.

> Stephan Riess and Thelma McKinney Riess (referred to herein as the sellers) entered into a contract with C. W. Murchison, who subsequently assigned to Simi Valley Development Company (referred to herein as the buyers) for the sale of certain real estate, namely: A three and one-half acre parcel of land in the Simi Valley in Ventura County, California, on which were located a number of wells (referred to herein as the water lands) and, in addition, approximately three hundred subdivided lots in the same area (referred to herein as the additional lands).
>
> The contract consisted of two separate letters from C. W. Murchsion to Stephan Riess, dated September 13, 1955, and June 12, 1956, constituting a single integrated agreement, under which: (1) The sellers were to convey the water lands and the additional lands to the buyers on June 12, 1956, (referred to herein as the consummation date). (2) The buyers were to deliver one-sixth of the common stock of the Simi Valley Development Company to the buyers on the consummation date. (3) The buyers were to pay the sellers $1,000,000 as follows: $50,000 was to be paid on the consummation date. $24,000 was to be paid in each of the two years immediately follow-

ing the consummation date. No fixed time was set for payment of the balance; it was to be paid at the rate of ten cents per 1,000 gallons of water produced, saved, and sold from the water lands, provided, however, that if during any year the amount payable at this rate should be less than $24,000, the sellers were to be entitled to take the difference in water at the rate of twenty cents per 1,000 gallons, though if the buyers should elect to pay the difference in money, they might do so. (4) 'Subject to' the physical ability of the water on the water lands to adequately service certain other lands which were owned by the buyers and which were to be developed for residential and commercial uses (referred to herein as the Montgomery lands), the buyers were to build or install a reservoir and pipelines on the water lands to transmit water taken therefrom to the nearest boundaries of the Montgomery lands by June 12, 1958. In case of a disagreement as to the sufficiency of the water on the water lands to adequately service the Montgomery lands, the question was to be submitted to arbitration. (5) The buyers were to have the right at any time to reconvey the water lands to the sellers and terminate the contract and their future obligations thereunder, if, in their opinion, the water on the water lands should no longer be capable of producing water in quantities sufficient to be commercially profitable to them.

Pursuant to the contract the sellers conveyed the water lands and the additional lands to the buyers on the consummation date. They have performed all the material covenants and conditions on their side of the contract.

During the fourteen months prior to the consummation date, the buyers paid the sellers $28,000 in fourteen monthly installments of $2,000 each (referred to herein as the voluntary payments). The contract recites that this amount should be a 'credit on the purchase price.' On or about the consummation date, the buyers paid an additional $50,000 to the sellers, and they delivered one-sixth of the common stock of Simi Valley Development Company to the sellers.

During the fifteen months immediately following the consummation date, the buyers paid the sellers $30,000 in fifteen monthly installments of $2,000 each. Thereafter, the buyers refused to make any further monthly payments, contending that the voluntary payments ($28,000) should be credited against the balance due for the last nine months of the first two year period ($18,000), thereby satisfying such balance and creating an overpayment of $10,000.

Subsequently, during certain meetings between the sellers and the buyers, and in certain correspondence and conversations between them, concerning future performance by the buyers under the contract, the buyers expressed some unwillingness to comply exactly with the terms of the contract. Whether the buyers actually repudiated the contract is in dispute.

The buyers did not build or install the reservoir and pipelines on the water lands by June 12, 1958, as promised, though they did build and install them at a later date before trial. They asserted that the water on the water lands was insufficient to adequately service the Montgomery

lands and that, therefore, the condition to their duty to build or install the reservoir and pipelines by that date did not occur.

The buyers have not paid the sellers at the contract rate for water produced, saved, and sold by them from the water lands, though between the consummation date and the date of trial they did produce, save, and sell water therefrom.

The buyers have never exercised their right under the contract to terminate the contract for insufficiency of the water on the water lands.

On October 8, 1958, the sellers brought the present action in the District Court. They demanded a jury trial. At trial they proceeded on the theory that the buyers committed total breach of the contract by failing to perform their duties thereunder and by unequivocally repudiating such duties.

Before and during the trial the buyers sought to enforce the contract's arbitration clause. They made a number of motions to stay the proceedings pending arbitration of the question of the sufficiency of the water on the water lands to adequately service the Montgomery lands, . . . 329 F.2d at 637-39.

These motions were denied by the district court. In addition, the court ruled that the contract was not susceptible of total breach, and that "at the times here relevant" only a partial breach had occurred. This partial breach consisted of: (1) the buyers paying only $30,000, instead of $48,000, during the two years immediately following the consummation date; (2) the buyers' failure to build the reservoir and pipelines on

the waterlands by June 12, 1958; and, (3) the buyers' failure to pay the sellers at the contract rate for water produced, saved, and sold by them from the water lands. Finally, the district court held that the $28,000 paid prior to the consummation date should be credited "against monies to become due under the contract after trial, not against the $48,000 due during the first two years." 329 F.2d at 639.

On appeal by both Riess and Murchison, this Court framed the issues then before it in the form of three questions. These were:

> (1) Did the district court err in ruling as a matter of law that the contract was not susceptible of total breach at the times here relevant?
>
> (2) Should the voluntary payments of $28,000 made prior to consummation date have been credited against $48,000 due under the contract during the first two years after the consummation date?
>
> (3) Did the district court err in holding that the buyers' duty to build or install the reservoir and pipelines on the water lands by June 12, 1958 was absolute and unconditional and that their failure to build or install them by that date constitute a breach of the contract regardless of the sufficiency of the water on the water lands to adequately service the Montgomery lands?

As to the first question, we overruled the district court on the ground that under California law the contract was not a unilateral contract "for future payments of money only" or "for performances of acts not connected with one another." Nonetheless, we expressly refrained at that time from determining whether the buyers had committed a total breach.

Our response to the second question sustained the district court—i.e., we held that the pre-consummation payment of $28,000 should not be credited against the $48,000 due during the first two years of the post-consummation period. We did not decide the manner in which the $28,000 should be credited against "monies to become due under the contract after trial," *viz.* whether against the monies next due under the contract after trial, against the last such monies due, or in some other fashion.

Finally, we held that the district court erred in treating as unconditional the buyers' duty to build or install the reservoir and pipelines by June 12, 1958. California law, as we perceived it, dictated otherwise. The duty so to build or install had been conditioned upon "the sufficiency of the water on the water lands to adequately service the Montgomery lands." 329 F.2d at 643. From this we reasoned that the district court's denial of the buyers' motions for arbitration, on the ground that the sufficiency of the water was immaterial, had been erroneous. We concluded this first appeal by observing that if the case was one which, under California law, was otherwise proper for arbitration "the buyers are entitled to have the question of sufficiency settled by arbitration." 329 F.2d at 644.

In keeping with the above holdings, we reversed and remanded for further proceedings.

B. The Second Appeal: *Riess v. Murchison*, 384 F.2d 727 (9th Cir., 1969).

On remand, the buyers moved over objection to refer the question of sufficiency to arbitration. After hearings, the district court ruled that the case was "otherwise proper for arbitration," and ordered the parties

so to proceed. We permitted an appeal from this ruling pursuant to 28 U.S.C. §1292(b) and sustained the district court. In so doing, we held that under California law arbitration pursuant to the contractual provision before us was proper even if the buyers had breached the contract in several respects and had refused to render any future performance solely for the purpose of giving the sellers "a belly full of litigation." We carefully distinguished such alleged conduct from that which occurs when a party denies all contractual liability, which denial under the applicable California law would thereby foreclose that party from later asserting any rights pursuant to an arbitration clause which is contained in the contract.

It is important in describing this second appeal to enumerate the issues which we explicitly stated had been left undecided. We expressly refused to pass upon whether the buyers had repudiated the contract. Nor did we pass upon the contention "that a duty of diligent development of the water lands by appellee should be read as an implied provision of the contract." 384 F.2d at 735, 736. The issue of total breach was left "untried and undecided." *Id.* at 736. We did recognize, however, that the district court's determination in the initial proceedings that the buyers had breached the contract by failing to pay for water produced, saved and sold had not been specifically appealed and thus constituted a portion of the law of the case. *Id.* at 733, fn. 2.

C. The Arbitration Proceedings.

Following our affirmance of the order to proceed with arbitration, a "Stipulation Re Arbitration and Order," dated July 1, 1968, was issued by the district

court. This order provided, among other things, that the arbitrators were to take testimony and consider all evidence submitted by the parties only on the following two issues:

> (a) How much water would have been necessary on June 12, 1958, on a continuous basis, for a reasonable period of time, to adequately service the lands covered by the Montgomery contract with an adequate supply of water, contemplating that such lands would be developed for residential and industrial uses;
>
> (b) Whether, on June 12, 1958, the well or wells then or thereafter located on the water lands were physically able to produce water, on a continuous basis, for a reasonable period of time, in the quantity determined by the arbitrators to have been necessary pursuant to paragraph [(a) above].

Pursuant to a second order of the district court, also dated July 1, 1968, the buyers were assigned the burden of proof with respect to both of these issues. The arbitrators convened on August 20, 1969 and hearings commenced on December 8, 1969. On May 14, 1970, the arbitrators filed their report, and gave the following response to the question posed in issue (a), set out above:

> Not less than 1,750,000 gallons per twenty-four hours, which is, substantially, 1,215 gallons per minute.

Issue (b), also set out above, was answered by the simple word "No."

In an addendum to the report, the arbitrators were careful to set forth their interpretation of certain of

the terms which had been employed by the court in framing the issues which they were to consider. "On a continuous basis," for example, was interpreted to require a substantially non-diminishing supply of water *for a period of at least 20 years. "To adequately service"* meant "normal pressure, normal home use on a year-round basis, shrubbery, fire protection, compliance with County requirements, etc."

The phrase "contemplating that such lands would be developed for residential and industrial usages" was explained by setting forth certain assumptions which the arbitrators had made. For example, a certain density of development was assumed. Of the 1,500 acres potentially available for development, fifteen percent was considered not worth developing. A density of 3.5 houses to the acre generally was assumed, although it was recognized that some of the acreage would be developed less heavily. In addition, it was felt that such development would require 10 years to complete, and only at the expiration of that period would the full 1,750,000 gallons per twenty-four hours be required. However, the arbitrators believed that the water would be inadequate at the end of five years.

In reaching their conclusion that the water would be inadequate at the end of five years, and that a negative response to Issue (b) was warranted, the arbitrators explicitly rejected as not proven the contention of the sellers that the reservoir from which the Riess wells drew water was subject to recharge from a distant source through underground structures. Moreover, even if such recharging took place, the arbitrators felt that any such recharge "would be subject to interception prior to reaching the water lands." The arbitrators then stated:

The estimated available water (rejecting as speculative the distant source theory as unproven), after substantial exhaustion of the stored water now in the underground reservoir which would be exhausted before five years, in the opinions of the three arbitrators, ranges from a sure minimum of 50 gallons per minute to 1,500 gallons per minute. (Mackintosh says 500 is the minimum to which he can agree, but he would put it higher if the distant source theory were proven. Faries put it at 300 per minute and Mann at 50-150 (He agrees with Mann as a safe business computation)).

II.

The Judgment From Which This Third Appeal Is Taken.

The arbitration award was confirmed by the district court on September 23, 1970. Thereafter the sellers filed a Fourth Amended Complaint over the objection of the buyers who, in due course, filed an Answer and a Cross-Claim. Trial without a jury commenced on September 20, 1971. The district court regarded this trial as a continuation of initial court proceedings that led to the first and second appeals outlined above rather than a new trial. At the conclusion of this proceeding the district court made, *inter alia*, the following findings of fact which, according to the district court, were to be treated as conclusions of law to the extent they could be denominated as such.

. . .

13. By the Contract above described the parties intended that the Buyers were obligated diligently and in good faith to endeavor to produce

as much water as the Water Lands were capable of producing so that such water could be saved and sold.

. . .

20. By conversations which occurred during meetings between Buyers and plaintiffs, and by acts and conduct, the Buyers expressed to plaintiffs their refusal to comply with the terms of the Contract.

21. The Buyers produced, saved, and sold water from the Water Lands between June 12, 1958, and January 28, 1964, but have never accounted to plaintiffs or the Court for the quantity so produced, saved, and sold.

22. On January 28, 1964, although the wells on the Water Lands were capable of further production, the Buyers ceased production from all wells on such lands, and on that date, and thereafter purchased water from the Metropolitan Water District of the City of Los Angeles.

23. The Buyers have never paid the Sellers at the Contract rate or at any rate for any of the water produced, saved, and sold from the Water Lands between June 12, 1958, and January 28, 1964.

24. The Buyers have never exercised or attempted to exercise their right under the Contract to terminate the Contract for insufficiency of the water from the Water Lands.

25. The Buyers never relieved themselves of their obligations under the Contract by reconveying or offering unconditionally to reconvey the Wa-

ter Lands to plaintiffs, as provided for in the Contract.

26. The Buyers have not paid $48,000 to the plaintiffs as required by the Contract during the two years immediately following June 12, 1956; they have paid a total of $30,000, leaving $18,-000 due and owing.

27. The Buyers have failed to keep records of water produced, saved, and sold from the Water Lands as required by the Contract. The Buyers have failed satisfactorily to explain their failure to keep such records.

28. In addition to the contractual obligations pertaining to the accounting and record-keeping requirements of the defendants, the Honorable Harry C. Westover, United States District Judge, in this proceeding, on July 18, 1960, ordered defendants to keep a record of all water produced from the wells of the Water Lands from said date and continuously thereafter. Buyers did not comply with the said order, and have offered no excuse for such noncompliance.

29. On October 18, 1960, in a signed order, the Honorable Harry C. Westover, United States District Judge, ordered that the plaintiffs and defendants were to make available to each other, upon demand, any and all documents relating to water production from the Water Lands since the execution of the Contract.

30. Plaintiffs' counsel has made numerous demands on defendants and their counsel for all documents relating to water production from the Water Lands, but neither defendants nor their

counsel have ever given plaintiffs a complete accounting or permitted plaintiffs to inspect any records pertaining to water production from the Water Lands, other than one letter dated August 10, 1961, addressed to the Simi Valley Development Company from a third party containing incomplete information; defendants have never offered any reason for such failure.

31. The Buyers have failed to make any accountings to the plaintiffs for the water produced, saved, and sold from the Water Lands as required by the Contract.

32. The conduct of the Buyers' closing down the wells, and failing to keep or to deliver records of water actually produced, saved, and sold during the periods when the wells were in production, has made it impossible for the plaintiffs or the Court accurately to determine the amount of water which the Water Lands in fact produced or which the Water Lands could have produced during the period when Buyers had possession of the Water Lands.

33. The Buyers have failed in good faith to carry out the terms of their Contract with plaintiffs, and the Buyers have taken steps to injure plaintiffs' rights and interests in the Contract, as follows:

(a) Buyers have failed and refused to make payments of $2,000 per month during each month of the first two years of the Contract;

(b) Buyers produced, saved, and sold water after the initial two-year period of the

Contract, but failed and refused to pay for any water so produced, saved, and sold;

(c) Buyers persistently failed to account to plaintiffs for the water produced, saved, and sold at any time and during any period;

(d) Buyers failed to maintain records showing water produced, saved, and sold; or if Buyers did maintain such records, they failed to produce such records in Court and failed to make such records available to plaintiffs;

(e) After the first 24 months of the Contract, in addition to Buyers' failure to make payments as is found in item (a) of this Finding 33, Buyers failed to make payment in any amount to plaintiffs, either in cash or in water, or to advise plaintiffs of Buyers' election to pay cash or to deliver water;

(f) Buyers failed to maintain the wells on the Water Lands in full operating condition, but on the contrary, neglected them, and in 1964, ceased all production from such wells and lands;

(g) At all times since 1958, Buyers have failed and refused to perform or to recognize their obligations to perform Buyers' obligations under this Contract, except that Buyers have demanded arbitration under this Contract and Buyers have installed certain pipelines and reservoirs (storage tanks).

34. By reason of Buyers' failure to pay to plaintiffs the agreed purchase price, plaintiffs have been damaged and are entitled to recover the sum of $1,000,000, less the sum of $108,000 paid by Buyers to plaintiffs and credited to the $1,000,000 purchase price. The net damage to plaintiffs by reason of Buyers' failure to pay the agreed purchase price is $892,000.

35. There is presently owing to plaintiffs pursuant to the terms of their Contract with defendants a total of $892,000.

In its Memorandum of Decision accompanying these findings, the district court stated that it had based its analysis on the premise that under the law of the case the buyers had breached the contract in two particulars:

(1) Failure to pay the amounts required to be paid during the two years immediately following the consummation date.

(2) Failure to pay for water produced, saved, and sold up to the filing of the original complaint in 1958.

It further held that the effect of its June 15, 1962 judgment, as modified by the first appeal, was to establish that the above breaches constituted only a partial breach. It stated:

> The court now finds that the judgment of this court, filed June 15, 1962, that there had not been an anticipatory breach but only a partial breach of contract, did not terminate the contract. The contract still exists and is operative, and the parties are bound thereby.

The district court's ultimate finding of total breach was then based on the additional failures to perform set forth in the above findings.

Judgment against the buyers in the amount of $892,000, together with interest at seven percent (7%) per annum from October 8, 1958, was entered on May 25, 1972. Their appeal therefrom is the matter currently before us. We affirm in all respects except as to the proper measure of damages which are recoverable. As to that feature, we reverse the district court's holding and direct that the district court compute the allowable damages in the manner hereinafter described.

The buyers attack the district court's findings and holding on the grounds that they could not have totally breached the contract because any non-performance by them was excused; that the record does not support the conclusion that the contract was totally breached; and that damages were improperly computed. We shall consider each of these contentions.

III.

Were Buyers Excused From Performance?

The essence of the buyers' contentions is that the bringing of the suit for total breach of the contract in October 1958 terminated any obligation on their part to perform the contract. They purport to reach this position (1) by asserting that the sellers, by bringing suit in 1958, elected to treat the contract at an end and "thereafter seek redress through the medium of litigation;" and (2) by insisting that they justifiably relied on this election to their detriment.

Their argument can best be understood by casting it in hypothetical form. Assume S conveyed Blackacre to B in exchange for B's promise to farm Blackacre

and to pay S an annual sum, equal to one half the gross value of the crops derived therefrom for a period of ten years, or until the sum of $50,000 had been paid, whichever occurs first, Following his conveyance, S became dissatisfied with B's methods of farming and the amounts he was receiving. S brought suit against B alleging a total breach of the contract by B and seeking to recover damages in an amount equal to the present value of B's entire future performance. B responded by denying that a total breach had occurred and that the breach, if any, was only partial. In the course of the litigation, it was determined that B was correct as of the date suit was initiated—i.e., only a partial breach had occurred. During the pendency of the litigation, B did not repudiate the contract but ceased all performance and retained Blackacre. It is the contention of the buyers in this case that B is entitled to cease such performance, retain the land, and be liable thereafter in damages only for the partial breach.

This should not be the law; nor do we think that it is the law. The line between a partial and a total breach is not so plain as to visit such a severe forfeiture upon a plaintiff who exaggerates his injury. Under the circumstances of our hypothetical, it was the duty of B to continue his performance or to offer to restore S substantially to his antecedent position. Failure to do either amounts to a total breach by B which entitles S either to amend his complaint to include a prayer for relief with respect to such breach or, if the case has proceeded to final judgment in which only damages for partial breach have been recovered, to bring a new suit seeking damages for the total breach. In this latter case, the initial proceeding is not *res judicata*; the second suit is upon a different and distinct injury.

It must be acknowledged that we have been able to find no precise precedent in the law of California, or elsewhere, for either the position we believe is correct or for that insisted upon by the buyers. We cannot believe that a doctrine as novel and as harsh as that advocated by the buyers would have escaped the attention of the courts of California or that of commentators. This silence reassures us.

The buyers press upon us authorities which assert that a party aggrieved by a breach of contract may not simultaneously pursue inconsistent remedies for relief. *Alder v. Drudis,* 30 Cal. 2d 372, 182 P. 2d 195 (1947), for example, so holds. Authorities such as *Alder* recognize that, following a total breach unaccompanied by a repudiation of the contract by the wrongdoer, the aggrieved party has a choice of three courses of action. He may treat the total breach as a partial breach and insist upon further performance by the wrongdoer; he may assert a total breach and seek damages measured by the value of what he would have received had the contract been performed; or he may seek restitution in which both he and the wrongdoer will be restored to the position they occupied at the time the contract was formed. He cannot recover both damages for a total breach *and* obtain restitution, the vice which led the Supreme Court of California to reverse the trial court's judgment in *Alder.* The choice between damages and restitution is forced to avoid placing the aggrieved party in a better position than he would have been in had the contract been performed. *See 5A Corbin on Contracts,* §1223 (1964). It serves the same purpose as does the rule that the injured party cannot at the same time receive a decree for specific performance and a judgment for damages

based on a total breach. *See 5A Corbin on Contracts, §1222 (1964).*

Usually the necessity of a choice of remedies, which inescapably arises only immediately prior to judgment, is described as an "election" in which the injured party either treats the contract as "in existence" and seeks damages for its breach or "rescinds" the contract and seeks to be restored to the *status quo ante.* Any necessity to elect at an even earlier date must rest upon facts which estop the injured party from altering his choice of remedies because the breaching party has made a substantial change of position in reliance upon the injured party's initial choice. This is well settled California law. *Roullard v. Rosenberg Bros. & Co.,* 193 Cal. 360, 224 P. 449 (1924). *See Corbin on Contracts* §1220 (1964).

These principles provide no support for the buyers' assertion that the sellers' initiation of this suit in 1958 for total breach of the contract amounted to an "election" to treat the contract at an end, and that this "election" thereby relieved the buyers of any obligation thereunder. The buyers were not misled in a way that makes consideration of their failure to perform subsequent to 1958 inequitable or unjust. Our rather lengthy recital of the history of this litigation amply makes clear that they not only used water from the Riess wells but also insisted for purposes of arbitration that the contract was not extinguished by commencement of this suit. Moreover, we find nothing in the record that could lead the buyers to believe that the sellers did not expect them to continue performance under the contract. It is true, of course, that the buyers were entitled to insist upon arbitration and to defer the construction of the reservoir and pipelines until that had

occurred; but in other respects the contract remained binding upon them. Full performance by the sellers already having occurred, the filing of this suit could not foreshadow a failure by the buyers to receive the consideration for which they had bargained.

The buyers also insist that they were justified in relying on the sellers' refusal to accept various proposals, which had been put forward by the buyers prior to the commencement of this suit, as evidence of an intention to treat the contract at an end. As we read the applicable testimony, these proposals, designed to facilitate a settlement of the dispute on terms generally favorable to the buyers, were rejected by the sellers who insisted upon either full performance or complete restitution. Rejection of an offered accord provides no basis for assuming that the offeree no longer asserts his rights under the contract. That he does so assert his rights is the overwhelming inference.

Nor are we impressed by the buyers' insistence that the sellers' reluctance to accept settlement terms offered by the buyers, and their resistance to efforts by the buyers to obtain arbitration, constituted a breach of the contract which would excuse the buyers from further performance. The sellers, as this Court recognized on the first appeal of this case, "have performed all the material covenants and conditions on their side of the contract." In 1958 the contract was executory only with respect to the buyers. Putting aside any residual implied covenants of cooperation to which the sellers might remain obligated, only the buyers could fail to perform in accordance with the terms of the contract. Moreover, any such implied covenants were not breached by the sellers' insistence upon their interpretation of the contract, including their views with respect

to arbitration which, it must be remembered, were resolved against them only after the second appeal to this Court. *Cf.* 4 *Corbin on Contracts,* §973. Cooperation, not surrender, is the outer limit of any possible executory duty to which the sellers remained liable at the commencement of this suit. We cannot find that this duty has been breached or repudiated.

The strongest argument made by the buyers to support their contention that their duties under the contract were terminated when this suit was filed in 1958 rests upon their interpretation of *Coughlin v. Blair,* 41 Cal.2d 587, 262 P.2d 305 (1953). They point to certain language in one portion of the opinion which dealt with the issue of whether a wrongdoer who has totally breached a contract could reduce his damages by receiving a credit for that portion of his performance which was rendered subsequent to the filing of the injured party's suit but prior to trial thereof. In treating this issue, the court stated as follows:

> Ordinarily this question does not arise. If the injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made. If the wrongdoer cannot induce the injured party to accept performance, he will ordinarily not perform. The record does not show why defendants chose to continue performance after the action was brought. Plaintiffs did not urge performance after the complaint was filed, and they could not prevent it. By commencing the action they fully and fairly informed defendants that instead of performance they sought money damages for the value of defendants' promise. Unless plaintiffs indicated that they were again willing to treat the

> breach as partial, the remedial rights provided by law were substituted for the rights under the contract. Restatement, Contracts, §313, Comment c. Thereafter defendants were absolved from all duties under the contract to furnish improvements. Subsequent work to that end would not be performance of a contract then existent but would be entirely voluntary. If prompted by defendants' self interest in the sale of other lots, such gratuitous benefit, wholly speculative on the record, would not constitute unjust enrichment to plaintiffs. Parties who have totally breached a contract cannot force performance on the injured parties.

41 Cal.2d at 602-603, 262 P.2d at 314.

The buyers appear to suggest that under the above language they were justified in believing that with the filing of the suit in 1958 the sellers had indicated that they would accept nothing but damages for a total breach, and that this belief led the buyers to eschew further performance under the contract. In this manner they relied, reasonably they assert, on the sellers "election" of remedies and prudently failed to render further performance for which they could receive no credit in the final assessment of damages. By this process of reasoning, buyers attempt to establish the "estoppel" basis of the election of remedies referred to earlier.

While we are not at liberty to reject the holding of *Coughlin* when confronted with a substantially similar situation in a diversity case governed by California law, neither are we required to extend this case beyond its facts. As we see it, such an extension is what the buyers are urging. There are two principal distinctions between the facts of this case and those of *Coughlin*.

The first is that in *Coughlin* neither party seriously questioned the existence of a total breach by the wrongdoer prior to commencement of the suit. Nor did subsequent litigation prove this assumption erroneous. Thus, without regard to whether credit for post-suit performance is allowed, the plaintiff in *Coughlin* was assured the recovery of damages for a total breach. To apply *Coughlin* herein the manner sought by the buyers would limit the recovery by the sellers to damages for a partial breach even though the sellers fully performed and the buyers substantially failed to do so. No case from California, or elsewhere, which applies *Coughlin* in such a context has been called to our attention.

The second distinction is that, notwithstanding the total breach in *Coughlin*, the injured party treated the breach as partial for approximately one year during which time he urged the wrongdoer to perform. Despite this opportunity to expunge the total breach, the wrongdoer failed to fulfill his contractual duties. *Coughlin* merely terminated this extended opportunity to perform fully. In the instant case there was no total breach in 1958 which could be expunged; there was only a partial breach coupled with a dispute about the sufficiency of the water and the applicability of the arbitration clause. While *Coughlin* permits an injured party who has fully performed to terminate the period of grace that he has extended, it does not require that one whose defective performance is incorrectly described as a total breach should thereafter be excused from all further performance.

These distinctions make clear that we are not required under California law to disregard buyers' total breach of the contract subsequent to the commencement of this suit because of the sellers' institution of

an action for total breach in 1958. We have examined carefully all the authorities relied upon by the buyers to support their interpretation of *Coughlin* and find none of them persuasive.

It should be obvious that in our analysis of the buyers' claim that they were excused from performance we have proceeded on the assumption that at the time this suit was commenced the contract had only been partially breached. The district court so held and we agree. However, the final result which we reach in this case would be no different even if we had considered the buyers to have been in total breach in 1958. This follows because damages for total breach must be fixed by reference to what the aggrieved party would have received had the contract in its entirety been performed. Where, as in this case, the performance of the defaulting party is to extend over a long period of time, such damages may be far different from what might be due and owing the injured party, under the terms of the contract, as of the date the total breach occurred. In computing such damages, the true issue of *Coughlin*—i.e., the availability of a credit for any performance rendered subsequent to the filing of a suit seeking damages for total breach—might arise; but in all events the injured party is entitled to the economic equivalent of full performance. Anything less is inadequate reparation.

IV.

Did Buyers Totally Breach?

The buyers insist that, even if not excused from performance on the grounds just discussed, their contract with the sellers was never totally breached. To support this contention they assert that they did not repudiate

the contract, that no evidence of any such repudiation exists, and that at no time has either the district court or this Court so held. We are inclined to agree. However, the absence of repudiation is not dispositive given that, in our view, the contract before us was totally breached by nonperformance.

The buyers argue that there could be no total breach by nonperformance because the arbitration proceedings established that the Riess wells were not physically able to produce water, on a continuous basis, to adequately service the Montgomery lands. They contend that this determination relieved them of any duty to construct a reservoir and pipelines, to produce, save, and sell water, and to perform any other duty imposed upon them by the contract. This overstates the effect of the arbitrators' findings.

Our approach to this issue requires that the situation which existed prior to the filing of this suit be examined. At that time the buyers had developed doubts about the capacity of the Riess wells to produce the quantities of water they originally had anticipated. Notwithstanding these doubts, they did not avail themselves of paragraph 8 of the September 13, 1955 letter agreement which provided:

> 8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of

> any then accrued but unpaid sums payable to you under said paragraph 2(b). If I should exercise the rights accorded me under this paragraph I shall have the right to salvage and remove from the Water Lands all fixtures, improvements and personal property located thereon owned by me. Also if I should exercise such rights I shall not be responsible or liable to you for the condition of any wells located on said Water Lands.

Nor did the buyers respond to the sellers' initiation of this action in 1958 by offering to rescind the contract. Instead, water was produced, saved, and sold from the Riess wells from the time of their acquisition by the buyers until January 28, 1964.

It is our view that the district court was correct in holding that the buyers "were obligated diligently and in good faith to endeavor to produce as much water as the Water Lands were capable of producing so that such water could be saved and sold." This implied obligation of "good faith" may well have been constructively conditioned upon the physical capacity of the Riess wells to service the Montgomery lands initially; but the buyers continuing performance of the contract, albeit defective in substantial respects, by producing, saving and selling water and constructing certain reservoirs, and pipelines effectively waived this constructive condition.[1] As a result, while the duty to erect the

[1]If it were true, as the buyers strenuously argue, that the sufficiency of the water to service the Montgomery lands was an absolute condition precedent to *any* duty to produce, save and sell, then they would have been required to assert their freedom from liability at the time the inadequacy became apparent and offer to make payment in accordance with the contract to the extent that they had received benefits thereunder. However,

(This footnote is continued on next page)

reservoir and pipelines contemplated by the contract was excused as a result of the arbitration, the implied covenant to endeavor in good faith to produce was not. The buyers' failure to perform a substantial part of their duties under this covenant is the heart of their total breach.

This implied covenant to endeavor in good faith to produce, save, and sell water is firmly rooted in California law and in the decisions of this Court. While it is true that under California law implied covenants are limited to those terms "which are necessary to make a contract reasonable, or conformable to usage," California Civil Code, §1655, and not inconsistent with other provisions of the contract, the decisions of California courts, even when refusing to find an implied covenant insisted upon by one of the parties to a contract, acknowledge that there exists an implied covenant to perform in good faith on the part of both parties to a contract. *See e.g., William S. Gray & Co. v. Western Borax Co., Ltd.,* 99 F.2d 239, 242 (9th

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even accepting, *arguendo* the buyers' contention that there existed no implied good faith obligation to produce, save and sell, buyers' construction of a limited reservoir and pipeline coupled with their continuing use of the wells would operate as a waiver of the express condition. *See, e.g.,* Sitlington v. Fulton, 281 F.2d 552 (10th Cir., 1960); Foster v. L.M.S. Development Co., 346 S.W. 2d 387 (Tex. Civ. App. 1961); John B. Robeson Associates, Inc. v. Gardens of Faith, Inc., 226 Md. 215, 172 A.2d 529 (1961).

If, on the other hand, buyers were to argue that no waiver occurred by their continuing to produce, save and sell because such action was contemplated by the contract whether or not the express condition arose, *see 3A Corbin on Contracts* §755, then, even absent an implied obligation to produce in good faith, the failure to account and pay for the water so taken would constitute material breach of the contract.

Cir., 1938) (applying California law); *Langenberg v. Guy*, 77 Cal. App. 664, ..., 247 P. 621, 623 (1926). *See generally* 1 Witkin, *Summary of California Law*, Contracts, §242 (7th ed.). The obligation to endeavor to perform in good faith in the context of the contract before us requires that the buyers endeavor in good faith not only to produce, save, and sell water but also to account properly therefor.

Although the authorities which imply covenants to develop and to market in mineral leases are not directly applicable to this case, the readiness with which such covenants are implied suggests to us that implying the covenant to endeavor in good faith to produce, save, sell and account does not run counter to the intent of contracts, such as this, pertaining to the extraction of natural resources from the earth. *See generally* 5 Williams & Myers, *Oil & Gas Law* (Implied Covenants) (1972).

V.

Were Damages Computed Improperly?

As already indicated, we believe the district court erred in computing damages. It treated the contract between the sellers and buyer as a contract for the sale of land for the price of $1,000,000. *See* Finding of Fact No. 34 *supra* at 12. This is an erroneous construction of the contract. Paragraph 2(b) of the contract, set forth in the margin[2] and heretofore described

[2]Paragraph 2(b), as amended, reads in full as follows:

2(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your

(This footnote is continued on next page)

in the first appeal, obligates the buyers to pay at "$0.10 per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands" and not otherwise. It is true, of course, that both the sellers and buyers had certain options in the event the pay-

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wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the balance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) [per thousand gallons] as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. In the event I should elect to make payment of any such deficiency in said $24,000 for any accounting year then it is agreed that if for the next accounting year you shall be entitled to receive in excess of $14,000 I shall be allowed a credit for such amount of the excess for such next accounting years, but not otherwise, up to the amount of the deficiency so paid by me with respect to the preceding accounting year. This shall be on an accounting year to year basis and shall not be cumulative from accounting year to year.

ments subsequent to the first two years of the contract did not amount to $24,000; but the fact remains that payments were to be measured by the water produced, saved, and sold.

It is likely that the district court's erroneous interpretation of the contract was influenced by the fact that the buyers have steadfastly refused to account for the water they did produce, save, and sell in any satisfctory manner and have made no effort to justify their termination of the use of any water from the Riess wells on January 28, 1964 other than to admit that other water became available at that time. This is not enough to relieve them of their "good faith" obligation. Faced with such contumacy the district court's reaching for some simple basis upon which to rest damages is understandable.

In our judgment, the district court should have turned to the finding of the arbitrators. These findings demonstrate clearly to us that sufficient water never existed to yield to the sellers the balance of the one million dollars provided by the contract. Damages should have been computed on the basis of what the sellers would have received had the buyers in good faith produced, saved, and sold that amount of water of which the Riess wells were capable of producing.

While it is a close question whether the findings of the arbitrators alone furnish sufficient data upon which to so measure damages, we believe that the interests of justice will be best served by treating this data as sufficient. *See, e.g., Steelduct Co. v. Henger-Seltzer Co.,*

160 P.2d 804, 813 (Cal. 1945); *Bertero v. National General Corp.*, 62 Cal. Rptr. 714, 729 (C.A. 1967); *Pacific Scientific Co. v. Glassey*, 54 Cal. Rptr. 235, 243 (C.A. 1966). *See generally* Baver, "The Degree of Moral Fault as Affecting Defendant's Liability," 81 *U. Pa. L. Rev.* 586, 592 (1933). Proceeding in this manner, we direct that damages be computed on the assumption that the Riess wells could produce water for 20 years commencing June 12, 1958. We further direct that it be assumed that during the period 1958 thru 1963 the production could and should have been at 300 gallons per minute twenty four hours a day and that for the balance of the twenty year term production could and should have been at 150 gallons per minute twenty four hours a day.

Against this amount so computed should be applied as a credit the voluntary payment of $28,000, which we hold under the circumstances of this case should be applied at the end of the payments for water. For this reason the credit of $28,000 should not be augmented by the accrual of interest. The unpaid $18,000, representing payments not made during the two years following the consummation date, should also be recovered, but with allowance for proper interest. The assumptions upon which we base these directions are largely derived from the addendum to the report of the arbitrators, which we regard as evidence properly before us, and represent our fairly conservative application of their estimates of the capacity of the Riess wells.

With respect to the computation of damages, we reserve the judgment of the district court and remand for the sole purpose of computing damages in accordance with the above assumptions. Such computation should utilize an interest and discount rate of 7 percent per annum. Interest or sums determined to be due and owing with respect to water should be computed from the first day of each year next succeeding that in which the water should have been produced, saved, and sold. Thus, the interest due on sums owing because of water which could and should have been produced, saved, and sold during 1958 shall be computed from January 1, 1959, that during 1959 from January 1, 1960, etc. Interest on the payments not made during the two years following the consummation date, *viz.* $18,000, shall be computed from the dates such payments were due.

Affirmed in part and Reversed in part.

APPENDIX B.

Memorandum of Decision.

United States District Court, Central District of California.

Stephan Riess and Thelma McKinney Riess, Plaintiffs, vs. John D. Murchison and C. W. Murchison, Jr., Executors of the Will of C. W. Murchison, Deceased, Defendants, vs. Simi Valley Development Company, a Third Party Defendant. Civil No. 964-58-HW.

Stephan Riess and Thelma McKinney Riess, husband and wife, owned approximately three and one-half acres of land in Simi Valley, Ventura County, California, on which had been drilled three wells, capable of producing many million gallons of commercially pure water; the acreage will in this Memorandum be referred to as "the water lands." In addition thereto the Riesses owned approximately three hundred (300) lots in the area of the water lands.

Since commencement of the above-entitled action, C. W. Murchison, a party defendant, expired, and his Executors have been substituted in his stead in this case. Also, the contract which is the subject of this controversy had been, by C. W. Murchison, assigned, and his assignees have made subsequent assignments and conveyances. For clarity and brevity only, all defendants in this case will be referred to as "Murchison."

C. W. Murchison, a wealthy Texan, desired to go into the subdivision business in California. In furtherance of such desire he purchased from one, Montgomery, approximately one thousand acres of land in Ventura County. Unless adequate water supply could be obtained the Montgomery land was unsuitable for

subdivision purposes; Murchison knew of the Riess water lands and negotiated with Mr. and Mrs. Riess for purchase of the water lands and the wells thereon.

On September 13, 1955 C. W. Murchison wrote a letter to Stephan Riess, which letter stated, page 5(b), in part:

> "I shall pay to you and your wife the sum of $1,000,000 * * *."

And the letter concluded, page 14, with the statement:

> "If the above and foregoing adequately and accurately reflects your understanding of the basis and general agreements and understandings between us regarding the subject matter hereof, please sign and have your wife sign the copy hereof handed you herewith and return such copy to me whereupon this letter shall become and constitute a binding contract between us in accordance with the terms hereof."

The Riesses considered the terms of the letter-contract and, on September 14, 1955, approved and accepted it by signing and returning the signed copy to Murchison. A copy of the letter is annexed hereto and made a part hereof, designated as Ehxibit A.

On June 12, 1956 C. W. Murchison, concluding that the letter-agreement of September 13, 1955 should be modified and changed, wrote a second communication to the Riesses, in which he said in the opening paragraph:

> "As has been previously suggested to you, I propose that we amend and supplement our letter Agreement of September 13, 1955 in the following respects:
>
> "* * *."

And the letter contained a concluding paragraph which stated:

> "If the above and foregoing is satisfactory and acceptable to you and Mrs. Riess * * *, it is requested that each of you please sign a copy hereof, having your signature acknowledged, and return the same to me, whereupon this letter shall become and constitute a binding contract between us in accordance with the terms hereof and the provisions hereof immediately effective. * * *."

After receipt of the June 12, 1956 letter, the Riesses on June 14, 1956 approved and accepted it, signed the letter and returned the signed copy to C. W. Murchison in accordance with his instruction. A copy of the letter of June 12, 1956 is annexed hereto and made a part hereof and is designated as Exhibit B.

The letter of September 13, 1955 and the letter of June 12, 1956 constitute the contract between Murchison and the Riesses for the sale of the water lands, the wells thereon, and three hundred (300) lots. The Riesses complied totally with the requirements of Exhibit A and Exhibit B.

Eventually the Riesses came to the conclusion that Murchison did not intend to fulfill the contract terms he had dictated; on October 8, 1958 the Riesses filed the within action, alleging that Murchison had breached the contract and had indicated that he did not intend to perform further under. The Riesses demanded payment in full of the contract price on the theory of anticipatory breach; and on April 3, 1962 the cause came on for trial.

After hearing the evidence, the court came to the conclusion that there had not been a total breach by

Murchison but only a partial breach of the contract and rejected plaintiffs' claim of anticipatory breach, finding that Murchison had breached the contract in three respects:

1. That Murchison had paid some but not all of the sums required to be paid under the contract.

2. That Murchison had not constructed a reservoir and pipelines within two years after the signing of the contract, as required thereunder.

3. That Murchison had not paid for all the water produced, saved and sold from the water lands.

At trial plaintiffs and defendants stipulated in open court that damages, accruing to plaintiffs for defendants' failure to construct the reservoir and pipelines within the two-year period and for failure to pay for water produced, saved and sold up to that time, amounted to $25,000.00. No attempt was made to segregate the amount attributable to failure to construct the reservoir and pipelines from the amount due for water produced, saved and sold; whereupon judgment was entered in favor of plaintiffs and against defendants in the sum of $25,000.00.

Exhibit B, paragraph f, provides in part:

> "If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, as contemplated in Paragraph 3 of the Letter Agreement, that issue shall be submitted to three (3) arbitrators, * * * whose decision shall be final."

Murchison, in response to the original Complaint filed herein, contended that a disagreement had arisen between the parties as to the physical ability of the wells to produce sufficient quantities of water to service the lands as contemplated and demanded that such dispute be referred to arbitration.

Upon examination of Exhibits A and B, the court concluded that they were so uncertain that arbitration would be a futile effort toward resolving the parties' differences. The Exhibits state that the wells were to produce sufficient water to "adequately service" the Montgomery lands and additional land contemplated by Murchison to be purchased by him. Nothing in the contract indicated what was meant by "adequately service"; although the water wells were to produce sufficient water to service not only the Montgomery lands but also "certain other lands", nothing appeared in the contract to indicate what "certain other lands" were contemplated by Murchison nor how extensive would be any such additional lands.[1]

At the time of the inception of this action the Montgomery lands had not been subdivided; work had commenced upon only a very small portion thereof. There was no indication as to how much nor what portion of the lands would be set aside for streets, roads, sidewalks, schools and churches, and there was no indication as to how large the lots would be nor what type of residences would be constructed thereon.

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[1]The first paragraph of Exhibit A recites:

"* * *, (a) the lands * * * which I have contracted, * * *, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi [sic] Valley of California."

In addition, part of the Montgomery lands was to be set aside for commercial development; but at the time the complaint was filed and at the time of the original demand for arbitration there was no indication as to how much of the land would be commercially developed nor what industries would be located thereon. Because of the uncertainties and conjectures involved, the court was of the opinion that arbitration would solve nothing.

Upon rendition of the judgment hereinabove mentioned for plaintiffs and against Murchison in the sum of $25,000.00, plaintiffs were dissatisfied, particularly in regard to the finding that there had not been a total anticipatory breach of the contract. Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.

Defendants also filed appeal, alleging error in the court's failure to refer to arbitration the question of the ability of the water wells to produce sufficient water to adequately service Montgomery lands and additional lands.

On March 17, 1964 the United States Court of Appeals rendered its first decision, *Riess v. Murchison,* 329 F.2d 635. The Court of Appeals sustained the trial court in its finding that Murchison had not paid the sums required to be paid in Exhibit A and in its finding that the buyer (Murchison) had breached the contract by failing to pay sellers the contract rate for water produced, saved and sold from the water lands. *See Note 2—Riess v. Murchison, 384 F.2d 727 at 733 (October 24, 1967).*

In its March 17, 1964 decision the Court of Appeals further held that the requirement to construct the

reservoir and pipelines within the two-year period depended upon the ability of the wells to produce water as contemplated by the contract and reversed this court in its finding of damages for failure to construct the reservoir and pipelines within the two-year period.

Upon remand the trial court then ordered arbitration; whereupon plaintiffs took a second appeal, and the Court of Appeals in due course affirmed the trial court. *Riess v. Murchison,* 384 F.2d 727.

Arbitrators were appointed and held extensive hearings. On May 15, 1970 they filed the report of arbitration, in which was found that on June 12, 1958 the wells located on the water lands were not adequate to supply water on a continuous basis in the quality determined by the arbitrators to be necessary to adequately serve the Montgomery lands and additional lands.

After the arbitration report had been approved by the court, plaintiffs filed a Fourth Amended Complaint, and the cause came on for trial on September 20, 1971. At trial the court took the position that the March 17, 1964 opinion of the Court of Appeals did not constitute an order for new trial. The Order of the Court of Appeals in Riess v. Murchison, 329 F.2d 635 is, at page 644:

> "The Judgment is reversed and the case is remanded to the District Court with directions to take such further proceedings as are consistent with the views expressed in this Opinion."

The trial court is of the opinion that the proceedings which commenced September 20, 1971 was a continuation of trial and that the only purpose of the September 20, 1971 hearing was to adduce additional evidence regarding the issues before the court.

As a consequence, the court started with the premise that defendants had breached the contract in two particulars:

1. Failure to pay the amounts required in *Exhibit A*;

2. Failure to pay for water produced, saved and sold up to the filing of the original complaint in 1958.

In the Fourth Amended Complaint plaintiffs alleged two additional breaches of contract:

a. Failure to keep records of water produced, saved and sold from the wells in question;

b. Failure to make an accounting to plaintiffs of water so produced, saved and sold.

The question of keeping records had arisen in the case some years previously. On July 18, 1960 the court admonished defendants to maintain adequate records disclosing the amount of water produced from the wells and records of disposition thereof. In open court defense counsel assured the court that adequate records would be maintained. However, at the September 20, 1971 hearing defendants demonstrated that records of the water produced, saved and sold had not been maintained. If any records had been kept at all, they were lost or were not available for examination by the court.

In an attempt to establish some sort of basis from which to estimate the water produced, saved and sold from the wells, on the morning of September 20, 1971 —the date of commencement of the hearing—defendants submitted a statement designated "Water Production" from the wells in question.

Inasmuch as defendants had not maintained records of their own, to prepare the "Water Production" statement they went to certain water companies using water from the Riess water lands and attempted to obtain from these companies their records of the amount of Riess water used by them; defendants also went to records kept by the State of California concerning water sold by the various water companies from the Riess wells. From the records so examined, defendants compiled statements of alleged production from the Riess water lands.

Defendants produced no records of their own, and the statement submitted to the court was entirely hearsay and not the best evidence as to produce and sale of water from the Riess wells.

The evidence adduced disclosed that at no time did defendants ever give to plaintiffs an accounting of water produced, saved and sold, and never at any time did defendants offer to pay for the water produced, saved and sold.

Defendants took the position that there was no obligation upon them to give to plaintiffs any accounting nor to pay for the water produced, saved and sold. It was the defense position that when the original complaint was filed plaintiffs were faced with an election of remedies; that at that time plaintiffs had the election of claiming termination of the contract in toto or asserting partial breach.

When the trial court ruled against plaintiffs on their theory of anticipatory breach, finding of partial breach only, defendants contended that the contract immediately terminated and there was no further liability

under the contract[2] and, consequently, that defendants did not have to make accounting of water produced, saved and sold and did not have to pay therefor. In fact, although this case has been pending in the courts for thirteen years and water has been produced, saved and sold from the water lands during pendency of the cause, no accounting and no payment has ever been tendered or made.

It is also defendants' contention that even though there was an obligation to pay for water produced, saved and sold, that obligation never matured because there was a necessity for plaintiffs to make demand for payment, at which time defendants had the election either to pay the sum of $2,000.00 per month or to pay in water and, as no demand had ever been made upon defendants to furnish water in payment, as provided in Exhibit A, defendants were forever relieved of any obligation for payment to plaintiffs.

Plaintiffs took the position that demand did not have to be made until there was an accounting of the production of water and, inasmuch as there had never been an accounting, no demand for payment was mandatory.

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[2]Defendants rely upon *Coughlin v. Blair*, 41 C.2d 587. However, that case states, at page 598: "*A judgment** in such an action [for total breach] absolves the defendant from any duty, continuing or otherwise, to perform the contract. * * *."

In their "Closing Argument" filed October 18, 1971, defendants contend, page 33:

> "The same reasoning compels a conclusion that bringing an action for total breach terminates the rights of the plaintiffs under the contract, and renders the contract unenforceable. * * *."

A judgment for total breach would have such an effect, but a judgment holding there was not a total breach but a partial breach does not terminate the contract.

**Emphasis supplied.*

The court now finds that the judgment of this court, filed June 15, 1962, that there had not been an anticipatory breach but only a partial breach of contract, did not terminate the contract.[3] The contract still exists and is operative, and the parties are bound thereby.

The court also finds that there was a duty upon Murchison to maintain records of water produced, saved and sold from the water lands; and inasmuch as records were not maintained by defendants this, too, was a breach of contract.

It is further found that it was defendants' duty to account to plaintiffs for water produced, saved and sold from the water lands. Inasmuch as no accounting was ever made or tendered to plaintiffs, this also was a breach of the contract.

In addition, the court finds another breach by defendants which is most important. There is an implied covenant of good faith which accompanies every contract; when a party enters into a contract, he represents to the other party that he will in good faith carry out the contract provisions incumbent upon him.[4]

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[3]Had the contract been terminated, the Ninth Circuit Court of Appeals would not have ordered arbitration in compliance with the contract.

[4]"There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. [Citations]. This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose. [Citations]." *Harm v. Frasher*, 181 C.A.2d 405 at 417.

Davis v. Kahn, 7 C.A.3d 868 at 877:

"* * * '[i]n every contract there is an implied covenant that neither party shall do anything which will have the ef-

(This footnote is continued on next page)

Murchison prepared the contract, Exhibit A and Exhibit B. The contract contemplated that water from the Riess wells would be used in the development of the Montgomery lands and "additional lands." In fact, the water was so used until early 1964.

One of the defense witnesses testified that the use of the Riess water was discontinued early in the year 1964. Another defense witness testified that Metropolitan Water became available on January 28, 1964 and that on that date the line leading from the Riess wells to the reservoir and pipelines serving the Montgomery lands was cut and that water supplied by Metropolitan Water District was then piped into the lines, so that after said date no water was produced from the Riess wells for the Montgomery lands. The Riess wells had supplied water from the contract dates to January 28, 1964—a period of approximately nine years.

Defendants contend that the reason for making the switch from Riess water-lands' production to Metropolitan Water District was that the wells were no longer able to produce sufficient water to adequately service the Montgomery lands. Defendants' witness testified that the pumps in the Riess wells could not produce a head of water sufficient for the needs of the subdividers. But the memorandum filed by defendants on September 20, 1971, hereinbefore described, showed that be-

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fect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. [Citation]' ."

United States v. Morehart, 449 F.2d 1283.

tween January 1 and December 31, 1963 water was produced, saved and sold from the Riess lands in the amount of 25,623,000 gallons.

The evidence shows the Riess wells were cut off production on January 28, 1964—the day Metropolitan Water District water became available to Murchison. Certainly an appreciable amount of water was produced between January 1, 1964 and January 28, 1964. No account has been made of this water production, and no offer of payment has been tendered by defendants to plaintiffs.

In its March 17, 1964 decision, the Ninth Circuit Court of Appeals held that the contract herein was susceptible to total breach. Riess v. Murchison, 329 F.2d 635 at 640. And in its October 27, 1967 decision (384 F.2d 727) that Court said, page 736:

> "* * *. The issue of 'total breach' of the contract remains untried and undecided."

The question now before this district court is whether the breaches hereinabove outlined, together with defendants' conduct during the past fifteen years, is sufficient to justify a finding that there has been total breach by defendants of the contract. This court believes the question demands an affirmative finding of total breach and that plaintiffs are entitled to recover from Murchison the sum of $1,000,000.00, less any amounts heretofore paid. The record shows that $108,000.00 has been paid on account.

Murchison could have terminated liability at any time, limiting plaintiffs' recovery to damages up to the

date of termination; for in his letter, Exhibit A (page 12, item 9) Murchison provides as follows:

> "In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b). * * *."

Neither Murchison nor his assigns have ever reconveyed to plaintiffs the water lands herein described.

Judgment will be ordered in favor of plaintiffs. Counsel for plaintiffs shall prepare findings of fact, conclusions of law, and judgment for submission to the court on or before April 1, 1972.

(illegible)

Judge

EXHIBIT A.

September 13, 1955

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

This letter agreement shall serve to evidence and confirm the basic general understandings and agreements entered into between us this date relative to the acquisition by me, or my nominees, designees or assignees (and it is understood that throughout this letter all references to me shall include my nominees, designees and assignees, if any), of certain lands now owned by you and your wife and the water rights pertaining thereto and the water wells situated thereon and the participation by you and your wife and Len Acton and Guy L. Mann, collectively, in the proportion of one-half by you and your wife and one-half by Messrs. Acton and Mann, in (a) the lands or the income and profits therefrom located in Ventura County, California which I have contracted, by contract dated August 26, 1955, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi Valley of California.

Our basic agreements and understandings are in general as follows:

1. You have represented and hereby do represent that you and your wife own good and merchantable title to certain lands in Ventura County, California comprising approximately 300 lots plus approximately three and one-half acres upon a portion of which there is presently located one or more wells capable of producing many millions of gallons of commercially pure water (the

portion of which lands upon which such well or wells are located are hereinafter referred to as the "Water Lands"), and hereby you agree to convey to me and I agree to purchase from you and your wife all such lands and all other lands owned by you in Ventura County, California, save and except the approximately two acres upon which your home and your domestic well is situated, for the consideration and upon and subject to the terms, provisions and conditions hereinafter set forth. With respect to such excepted lands you shall also assign and convey to me all water rights appurtenant to same save and except such water as may be produced from any well on said excepted lands for domestic uses and with the understanding, however, that I shall not have any rights to the use of the surface of such excepted lands, or any portion thereof, in any operations connected with the water rights appurtenant thereto. I shall have the "first right of refusal" for thirty days at appraised value to purchase such excepted lands in the event you should ever elect or desire to sell or otherwise dispose of same.

2. In consideration for such lands and water rights I agree to:

(a) Grant unto you, your wife, Len Acton and Guy L. Mann, collectively, but in the proportions of one-half to you and your wife and one-half to Messrs. Acton and Mann, a one-third participation in the lands of the net profits therefrom covered by the aforesaid contract between myself and M. Laurence Montgomery (hereinafter called the "Montgomery Lands") together with a like interest or participation in

such other lands as I might hereafter acquire within the said Semi Valley as may be serviced by water from wells now or hereafter located upon the Water Lands. This interest or participation in such lands shall be either in the character of an undivided one-third title to the fee thereof or the right to receive one-third of the net profits to be derived from the operation, development and/or sale thereof or an interest in a limited partnership which would own such lands and in which you, your wife and Messrs. Acton and Mann would be limited partners and I would be the general partner as we may mutually agree upon after due consideration is given to the practicalities of the situation, the legal protection to you, your wife and Messrs. Acton and Mann from the possibility of any dilutions or cutting-off of your rights or equities by virtue of creditor actions, sales to bona fide purchasers or other such occurrences. In any event, however, it is agreed that regardless of the nature or character of the interest and participation of yourself, your wife and Messrs. Acton and Mann in said lands or in the net profits therefrom, I shall have full discretionary rights of management, control and disposition of such lands regardless of the character of yours, your wife's and Messrs. Acton's and Mann's said rights and interests therein. Also it is agreed that I shall have the "first right of refusal" for thirty days to acquire the respective said interests of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, in the event of any proposed sale or

other disposition of any portion of any of such interests. If within ninety days from the date hereof we are unable to reach an agreement satisfactory to me as to the nature or character that the rights and interests of yourself, your wife and Messrs. Acton and Mann in and to said lands (i.e. the Montgomery Lands and the additional lands, if any, in the Semi Valley above provided for) is to be, that is to say, whether such rights and interests are to be in the form of an undivided one-third of the fee or the right to receive one-third of the net profits derived from the operation, development and/or sale of such lands or in the nature of a limited partnership interest, then at my option I shall have the right to terminate this agreement in its entirety.

(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the bal-

ance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. In the event I should elect to make payment of any such deficiency in said $24,000 for any accounting year then it is agreed that if for the next accounting year you shall be entitled to receive in excess of $24,000 I shall be allowed a credit for such amount of the excess for such next accounting year, but not otherwise, up to the amount of the deficiency so paid by me with respect to the preceding ac-

counting year. This shall be on an accounting year to year basis and shall not be cumulative from accounting year to year.

3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract.

4. To secure you in the fulfillment of my obligations under paragraph 2(b) above you shall have a prior lien and deed of trust upon the Water Lands but under such deed of trust I shall be obligated to give you no more than a special warranty of title.

5. (A) With regard to the participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or in the net profits therefrom, as the case may be, any sales, transfers or conveyances to the rights and equities of yourself, your wife and Messrs. Acton and Mann and any affiliated interest to which same might be transferred shall expressly recognize and agree to honor such rights and equities. The term "affili-

ated interests" is hereby defined to mean and include all corporations or other business entities owned or controlled by me, the members of my immediate family and the members of their immediate families, all trusts of which I or any member of my immediate family or any member of their immediate families might be a beneficiary and all corporations owned or controlled by any of such persons or trusts.

(B) Neither you, your wife nor Messrs. Mann or Acton shall be personally liable or obligated for any expenses or costs attributable to or incurred in connection with the acquisition, operation, development, maintenance or sale or other disposition of the Montgomery Lands or any of the additional lands in the Semi Valley which might hereafter be acquired and which are covered by the provisions of paragraph 2(a) above, but the participation of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, shall collectively be charged with one-third of all such costs and expenses. In this regard, however, I agree that in the event any unreasonable expenses shall be incurred in connection with or attributable to the operation, development, maintenance or sale or other disposition of such lands, or any portion thereof, the said interest and participation of yourself, your wife and Messrs. Acton and Mann will be charged only with one-third of such amount thereof as shall be reasonable as determined after giving effect and consideration to all pertinent and relevant factors pertaining to the incurring of any such expenses claimed to be unreasonable.

(C) It is agreed that, anything herein to the contrary notwithstanding, all costs and expenses heretofore incurred or paid to you or for your account by the Murmanill Corporation or Messrs. Acton or Mann attributable to the formation of the deal and transactions contemplated hereby up to but not to exceed $25,000 in the aggregate shall at my option either be deducted from the balance of $950,000 deferred purchase price provided in paragraph 2(b) or shall be charged against and payable out of the first monies accruing and payable to you, your wife and Messrs. Acton and Mann from yours and their interest and participation in the Montgomery Lands. All sums paid or payable to you during or for the first two year period provided for in paragraph 2(b) hereof in excess of the amounts which during such two year period would otherwise be payable to you on the basis of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands shall be charged to the interest and participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or the net profits therefrom or the interest of yourself, your wife and Messrs. Acton and Mann in any limited partnership created in respect of the Montgomery Lands, as the case may be, and shall be repaid by you, your wife and Messrs. Acton and Mann out of the first monies accruing and payable to you from such interest and participation and to secure such repayment I shall have first lien and assignment upon said interest and participation.

6. It is agreed that I shall have ninety days from the date hereof in which to make, or to cause to be made, an investigation as to the merchantability of your title to the lands herein provided to be purchased by me and of the merchantability of your title to the water rights appertaining to such lands and as to the right of the owner of the Water Lands to exclusively appropriate to his or its own uses and purposes uses and/or to purposes designated by him or it all water that can be produced from wells located upon such lands, and it is further agreed that all obligations on my part hereunder are conditional upon my being satisfied:

(a) that you have good and merchantable title to all lands herein provided to be purchased by me from you and all of the water rights appertaining thereto and to all of the water that may be produced from wells now or hereafter located on the Water Lands; and

(b) that upon my becoming the owner of the Water Lands, I shall have the exclusive right to appropriate to such lawful uses and purposes as I might designate or desire all water that may be produced from wells now or hereafter located upon said lands particularly, but not limited to, the right of dedication of the preferential rights to such water to uses thereof on (or for the benefit of) the Montgomery Lands to the exclusion of all other uses.

With respect to the foregoing I understand that for some time now you have been furnishing from wells located on the Water Lands on a temporary and emergency basis some water to the Santa

Susana Mutual Water Company, and it is agreed that you may continue to supply water from such wells to said water company upon a temporary and emergency basis only and upon the condition that such service may be discontinued at anytime upon reasonable notice in no event to be more than ninety days notice.

7. In the event of the consummation of the purchase of the lands herein provided to be sold by you to me, the deed or deeds executed by you and your wife shall contain covenants of general warranty both as to such lands and as to the water rights appertaining thereto. Also by such deed or deeds you shall convey to me without any additional consideration all well equipment, pipe, pumps and other such property now owned by you and used or useful in the operation and maintenance of the wells now located on the Water Lands and in the drilling of additional wells.

8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b). If I should exercise

the rights accorded me under this paragraph I shall have the right to salvage and remove from the Water Lands all fixtures, improvements and personal property located thereon owned by me. Also if I should exercise such rights I shall not be responsible or liable to you for the condition of any wells located on said Water Lands.

9. It is agreed and understood that this letter agreement is intended only to reflect and record in general our basic and general understandings and agreements with respect to the subject matter hereof, and we each agree, therefore, upon any reasonable request by the other to make and enter into such further and additional more formal written contracts as may be necessary or desirable to more effectually carry out, reflect and record the true intentions and purposes of this agreement.

10. As set forth above, all references herein to myself shall also include any nominees or designees of mine and the agreements herein contained on my part shall be binding upon and shall inure to the benefit of my heirs and assigns, it being expressly contemplated by me that I will assign my rights and my obligations hereunder to an affiliated interest (as that term is hereinabove defined). By the same token, it is agreed and understood that all references to you herein shall also include your wife and the agreements herein contained shall be binding upon you and your

wife and yours and your wife's respective heirs, representatives and assigns.

11. For the purposes of the investigations provided for in paragraph 6 above, you agree to make available to me or to my representatives all data and information that you may possess or to which you may have reasonable access pertaining to the matters provided for in said paragraph 6 and also to make yourself available at reasonable times and upon reasonable notice for conferences and discussions as to such matters, however, if any expenses are incurred by you in connection therewith I will bear and pay same or will reimburse you therefor.

12. During the past several weeks representatives of mine have made certain examinations of and tests with respect to the wells presently located on the Water Lands and you acknowledge that such examinations and tests have not in any manner damaged such wells. Also it is agreed that during the period provided for in paragraph 6 hereof representatives of mine may make further and additional tests of and with respect to the wells presently located on the Water Lands and it is agreed that I shall not be liable to you for any damage occasioned to any of said wells by any such tests provided you agree in advance as to such tests and further provided that my representatives do not conduct same negligently.

If the above and foregoing adequately and accurately reflects your understanding of the basic and general agreements and understandings between us regarding the subject matter hereof, please sign and have your

wife sign the copy hereof handed you herewith and return such copy to me where upon this letter shall become and constitute a binding contract between us in accordance with the terms hereof.

Very truly yours,

/s/ C. W. Murchison
C. W. Murchison

The above and foregoing is hereby approved and accepted as of the 14th day of September, 1955.

/s/ Stephan Riess
Stephan Riess

Recorded at request of Stephan Riess at 45 min. past 3 p.m. Official Records Ventura County, Jul. 9, 1958.

INDIVIDUAL ACKNOWLEDGMENT

State of California, County of Santa Barbara—ss.

On this 9th day of July, 1958 before me, J. L. Turner, a Notary Public in and for said Santa Barbara County, personally appeared Stephan Riess and Thelma Riess known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

WITNESS my hand and official seal.

/s/ J. E. Turner, Notary Public in and for said Santa Barbara County and State.

My commission expires October 17, 1959.

EXHIBIT B.

Dallas, Texas
June 12, 1956

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

As has been previously suggested to you, I propose that we amend and supplement our Letter Agreement of September 13, 1955 in the following respects:

(a) You and Mrs. Riess shall immediately execute and deliver to me, and I shall accept, a general warranty deed covering the lands referred to in said Letter Agreement as the "water lands," together with all wells, water rights and other improvements and appurtenances thereon, which said lands are described in Exhibit A attached hereto. The monies which I have previously caused to be paid to you, aggregating the sum of $78,000.00, is, and shall be, of course, a credit on the purchase price of said water lands and other properties.

(b) I shall pay, or cause to be paid, to you and Mrs. Riess an additional $25,000.00 in consideration for which you and Mrs. Riess shall execute and deliver to me a general warranty deed covering your homesite and all other lands which you and she, and either of you, own in the area of your homesite and the Simi Valley.

(c) In further consideration of the above mentioned additional $25,000.00 to be paid you for your homesite and other lands, you shall, upon

my request, make locations for Well No. 3 adjacent to the present Wells 1 and 2, and for a well in the McGrath Bowl on the Montgomery lands and for any other well or wells that I may desire within a radius of three (3) miles of said present wells.

(d) Paragraph 2(a) of the aforesaid Letter Agreement shall be stricken in its entirety and all other provisions of the Letter Agreement relating to the interests or undivided profit rights of yourself and Mrs. Riess and Messrs. Len Acton and Guy Mann in the Montgomery lands and in other lands to be acquired by me in the area shall be eliminated and you and Mrs. Riess and Mr. Acton and Mr. Mann shall surrender all of such rights and interests in consideration of the transfer to each of you of 1/12th of the common stock of Simi Valley Development Company.

(e) That portion of Paragraph 2(b) which provides that in certain situation or contingencies you will have a right to receive water at the rate of 20¢ per gallon shall be changed to provide that the rate shall be 20¢ per 1,000 gallons.

(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, as contemplated in Paragraph 3 of the Letter Agreement, that issue shall be submitted to three (3) arbitrators, one of which shall

be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final.

(g) Paragraph 4 which provides that you shall have a lien and deed of trust to secure the performance of my obligations under Paragraph 2(b) be eliminated but I shall remain liable for the payment to you as provided by the Letter Agreement, as here amended.

(h) It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, in my opinion, the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint.

(i) Paragraph 5(c) shall be eliminated, but in lieu thereof it shall be understood and agreed that all monies which have been expended and which may hereafter be expended by the Murmanill Corporation, directly or indirectly, in connection with the acquisition by me or by my nominees or assignees of any of the properties referred to in said Letter Agreement, or in connection with any title examination thereof or in connection with the testing and reworking of wells, and including engineers' salaries, fees and expenses, and all monies theretofore and which may hereafter be ad-

vanced by the Murmanill Corporation to or for the account of Simi Valley Development Company shall be shown as an "account payable" of Simi Valley Development Company.

If these proposed amendments and supplements are acceptable to you, I agree to cause 1/12th of the common stock of Simi Valley Development Company to be transferred to you and a like amount to Mrs. Riess and to Mr. Acton and to Mr. Mann.

It is my purpose to assign all of my rights in the September 13, 1955 contract and in this amendment to Simi Valley Development Company but it is understood that I shall not be relieved of any of my obligations under said Letter Agreement, as here amended. It is further understood that wherever reference is made to me in said Letter Agreement or in this amendment and supplement, the reference shall also include and cover and shall bind and inure to the benefit of the said Simi Valley Development Company and its successors and assigns.

I also agree that if this amendment is accepted, the supplemental letter of September 13, 1955 relative to my right to change the Letter Agreement in such a way as to make the monies received by you take the status of ordinary income rather than that of capital gain, shall be cancelled.

Except as hereinabove provided, the Letter Agreement of September 13, 1955 shall stand and is hereby ratified and confirmed.

If the above and foregoing is satisfactory and acceptable to you and Mrs. Riess, and to Mr. Acton and Mr. Mann, it is requested that each of you please sign a copy hereof, having your signature acknowledged, and return the same to me, whereupon this letter shall become and constitute a binding contract between us in accordance with the terms hereof and the provisions hereof immediately effective. This assignment shall be binding upon me and all the parties accepting the same, regardless of the failure or refusal of any other party or parties to accept it.

Yours very truly,

/s/ C. W. Murchison
C. W. Murchison

The above and foregoing is hereby APPROVED and ACCEPTED as of the 18th day of June, 1956.

/s/ Stephan Riess
Stephan Riess
/s/ Thelma Riess

Thelma Riess, Wife of
Stephan Riess

Len Acton
Guy L. Mann

State of Texas, County of Dallas—ss.

On this 18th day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared STEPHAN RIESS and THELMA RIESS known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Ruth Palmer
Notary Public in and for said
County and State.
Ruth Palmer

[Seal]

State of Texas, County of Dallas—ss.

On this 18th day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Murchison, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ C. W. Murchison
Notary Public in and for said
County and State.

Real property in Ventura County, California, described as follows:

Portions of Santa Susana Valley View Tract No. 1 as per map recorded in book 18 pages 1 to 7 inclusive of Maps, Susana Knolls Annex as per Licensed Surveyor's Map filed in book 4 page 68½ of Record of Surveys of Ventura County, and of any unsubdivided portion of the Rancho Simi in book 3 page 7 of Maps lying within an area in the county of Ventura, State of California, described as a whole as follows:

Beginning at the most southerly corner of parcel 3039 as shown on said Licensed Surveyor's Map and being a point on the boundary of the land described in deed to C. J. McGrath and wife, recorded July 11, 1945, in book 724 page 193 of Official Records, thence,

1st: Northeasterly along the southeast lines of parcels 3039-3038 and 3037 of said Susana Knolls Annex to the southeast corner of said parcel 3037; thence,

2nd: Northerly in a direct line to the southwest corner of parcel 3036 as shown on said Licensed Surveyor's Map; thence,

3rd: Easterly along the southerly line of said parcel 3036 to the southeast corner thereof; thence,

4th: Northerly along the easterly lines of parcels 3036 and 3035 of said Susana Knolls Annex to the southeast corner of lot 1055-A of said Santa Susana Valley View Tract No. 1; thence

5th: Easterly along the southerly line of said lot 1055-A to and along the southerly line of lot 1054 of the tract

last referred to the southeast corner of said lot 1054; thence,

6th: Northerly in a direct line to an angle point on the easterly line of lot 1050 of said Santa Susana Valley View Tract No. 1; thence

7th: Northwesterly to the most northerly corner of said lot 1050; thence,

8th: Southwesterly in a direct line to the most southerly corner of lot 1049 of said Santa Susana Valley View Tract No. 1; thence,

9th: Northwesterly in a direct line to an angle point in the westerly line of lot 1047 of the last referred to tract; thence,

10th: Westerly to the most northerly corner of lot 1060 of said Santa Susana Valley View Tract No. 1; thence,

11th: Westerly along the northerly lines of lots 1060 and 1060B of Santa Susana Valley View Tract No. 1 to the east line of lot 1191 of Santa Susana Knolls No. 1 recorded in book 19 page 16 to 22 inclusive of Maps; thence,

12th: Southerly to the most southerly corner of said lot 1191; thence,

13th: Southwesterly along the southeasterly lines of the tract last referred to, to the most southerly corner of lot 1184 of said tract; thence,

14th: Southwesterly in a direct line to the point of beginning.

EXCLUDING and EXCEPTING therefrom the property vested in Dorothy Rowan which is lots 1060 and 1060A of Santa Susana Valley View Tract No. 1, recorded in Book 19, page 16, Miscellaneous Records of Ventura County.

Said reserved and excepted surface real property is described as follows, to wit:

Lots 3009 to 3015, inclusive, and lots 3033 and 3034 of Susana Knolls Annex, as per map recorded in Book 4, page 68½, Records of Surveys, County of Ventura, California.

APPENDIX C.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Stephan Riess and Thelma McKinney Riess, Appellees, v. John D. Murchison and C. W. Murchison, Jr., Executors of the Will of C. W. Murchison, Deceased, Appellants, v. Simi Valley Development Company, a corporation, Third Party Defendant-Appellant. No. 72-2528.

Filed: November 5, 1974.

Before: CHAMBERS and SNEED, Circuit Judges, *KING, District Judge.

The petition for rehearing filed by the Plaintiff-Appellees is hereby denied.

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*Honorable Samuel P. King, United States District Judge, District of Hawaii, sitting by designation.